BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF THE WACKENHUT CORPORATION	)	
	)	Docket No. MSBCA 2216
Under Department of Public Safety and Correctional Services Contract No. Q0097021	)	

February 4, 2004

Contract Interpretation - Reliance - A contractor's interpretation of ambiguous language in an invitation for bids or request for proposals where the ambiguity is construed against the State must still be reasonable and actually relied upon in compiling the contractor's bid or offer.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial by the Department of Public Safety and Correctional Services (DPSCS) of its claims for an equitable adjustment arising out of the captioned Contract relating to the provision of construction and food service.

The appeal involves four (4) claims. The first claim involves costs allegedly incurred related to construction renovation work as the result of the State's alleged failure to reveal and timely relocate live utilities, to remove asbestos from a building known as "Building G," whose demolition was required by the Contract, and for other differing site conditions (Differing Site Conditions Claim). Related to the Differing Site Conditions Claim is Appellant's second claim, in which Appellant seeks to recover costs allegedly incurred due to the State's refusal to pay the construction renovation period unit price for meals during the entire actual renovation period (Renovation Pricing Period Claim). Appellant's third claim is for the expenses Appellant allegedly incurred due to the alleged under ordering of meals by DPSCS (Under-Ordering of Meals Claim). Appellant's fourth claim concerns the State's alleged failure to pay for staff meals served during the Contract (Staff Meals Claim).

Findings of Fact

1. In January or February, 1998, Appellant and DPSCS entered into the above captioned Contract to provide food service at various correctional facilities located in Baltimore, Maryland and to renovate the Maryland Penitentiary food service area.[1]
2. The Contract called for the provision of food service for a term of five years beginning on February 1, 1998 and expiring on January 31, 2003.
3. Under the Contract, Appellant was required to provide three meals per day, seven days a week to all the inmates under the jurisdiction of each facility.
4. Appellant was the incumbent contractor on the predecessor contract for the furnishing of food service to both inmates and correctional staff for a number of prison facilities in Baltimore. Those facilities included various pre-trial detention facilities such as the Baltimore City Detention Center (BCDC) and the Central Intake and Booking Facility.
5. Under the predecessor contract, Appellant was paid the same unit price for staff meals as the unit price for inmate meals, although it was recognized that the cost of furnishing staff meals was higher than that for inmate meals.
6. Brian Mathiews, Appellant's Regional Manager for Renovations and later Chief Vice President of Operations, testified that between 250,000 and 300,000 staff meals were served each year.
7. The Request for Proposals (RFP) for the instant Contract was issued by the DPSCS in June 1997.
8. The new Contract was a five-year continuation of the previous contract for food service on the pre-trial or detention side of the prison facilities, with the addition of another group of prison facilities in Baltimore. The additional facilities were a group of facilities in or associated with the Maryland Penitentiary (Penitentiary). During the hearing, the requirements for the facilities for sentenced offenders were referred to as the "prison side," to distinguish them from those required on the "pre-trial" or "detention" side under the earlier contract.
9. Another added feature of the RFP for the new Contract was the addition of construction work to rehabilitate or renovate the kitchen and food preparation facilities at the Penitentiary and several other kitchen facilities on the prison side.
10. The RFP as it related to the construction work invited prospective offerors to obtain or review a designated list of existing construction drawings for the kitchen facilities to be renovated or rehabilitated.
11. Regarding staff meals, the RFP contained an estimate for the number of staff meals on the pre-trial or detention side. The RFP did not contain any estimate for staff meals for the prison side of the Contract. Staff meals are more expensive than inmate meals because staff meals include additional food choices not available to inmates.
12. Preparation of Appellant's proposal and its pricing for the new Contract was conducted under the guidance of Appellant's division president, Brian Reynolds. Brian Mathiews assisted him.

[1]The Contract was approved for form and legal sufficiency by the office of the Attorney General on February 5, 1998 after Appellant signed it on January 30, 1998. Presumedly, the Board of Public Works approved the Contract, as required, prior to execution by Appellant.

13. Appellant's review of the RFP suggested that the new Contract[2] was structured in the same manner as the incumbent contract, with similar terms for the payment of "number of meals ordered" by the State for the various facilities listed in the RFP.
14. Brian Reynolds testified that the wording in the Contract was almost identical to the previous contract.
15. The form of the standard menu invoice to be used by the contractor in billing for "meals ordered" was the same as in the prior contract.
16. The standard menu invoice, which was attached to the Contract as Attachment #8, has a column for the "number of meals ordered" during the month. It does not specify the "number of inmate meals ordered" during the month.
17. Paragraph 6.1 of Attachment #3 of the Contract states that "at least two hours before each meal, the Department Representative's designees for each facility will give the Contractor Representative a written count of the number of meals to be prepared for the next meal in that facility by dining area and broken out by special management meals, trays, bag meals and congregate feeding."
18. Appellant was required to use "meal counts ordered" as the figure for billing purposes; the Contract specifically provided that "The contractor may invoice only for meals ordered by the Department, not for meals received by the Department." The RFP, in a footnote regarding pricing information, contained an admonition to "Please remember that STAFF meals will not be counted as meals ordered; however the contractor will be required to prepare and serve the STAFF meals."
19. Paragraph 6.4 of Attachment #3 of the Contract provided that two (2) hours before each meal, the State would furnish the contractor with a written count of the number of staff meals for each facility so that the contractor could determine the number of staff meals to prepare. Paragraph 6.4 further provides that "Staff meals shall not count as meals ordered."
20. Brian Reynolds testified that of the 250 contracts that he had been involved in over his 20 years in the business, he never entered a contract where staff meals were provided for free. He testified that it would be "absurd" not to charge for staff meals.
21. There was no indication by anyone from the State during Contract negotiations that Appellant would only be paid for inmate meals and not for staff meals.
22. Only two (2) firms submitted proposals: Appellant and Aramark Corporation (Aramark), the largest private contractor in the correctional food service business.
23. The State's Procurement Officer, Myles Carpeneto, who had also been the procurement officer for the previous procurement, found that both firms had submitted proposals reasonably susceptible of being selected for award.
24. As part of the negotiations process both offerors were permitted to submit a list of questions concerning provisions of the RFP. On or about July 8, 1997, both Appellant and Aramark submitted a list of questions concerning the solicitation. Mr. Carpeneto, the State's Procurement Officer, prepared the State's responses to the questions submitted by the offerors.
25. Question number 11 of Aramark's set of questions dealt with whether the contractor would be paid for staff meals. Specifically, the question stated "Section IV. P. 32 NOTE 2 states that STAFF meals will not be counted an ordered meal. Does this mean that the contractor

[2]The proposed new contract was included with the RFP as specifications.

will not be paid for STAFF meals?"

26. Because there was an error in the numbering of Aramark's set of questions, Mr. Carpeneto renumbered the question list in his marginal notations. Consequently, the answer to Aramark's question number 11 appeared as the answer to question 12 of the marginal notations. The answer given to that question was the single word, "Yes," without any further explanation or discussion.

27. On July 28, 1997, a copy of the marginal notes and responses was furnished to the offerors as part of Addendum No. 1 to the RFP.

28. In September, 1997 the State issued Addendum No. 4 to the RFP, making significant changes to the requirements of the solicitation. The Addendum added the demolition of Building G to the renovation work and the construction of a new loading dock in its place. Building G was a large, four-story brick-faced concrete building located adjacent to the main MP Kitchen building.

29. Previously, in order to get to the lower level of the kitchen building where the bulk storage and freezers were located, trucks would have to offload next to Building G and roll carts through the ground level of Building G to reach the lower level of the kitchen building. The new RFP addendum called for the demolition of Building G and the construction of a new loading dock on the site of the former Building G in order to permit better access to the Penitentiary kitchen storage facilities.

30. Addendum No. 4 to the RFP did not contain any reference to existing drawings of Building G or any of its features. Neither were such drawings made available by the State to the offerors.

31. Addendum No. 4 called for another round of offers and further discussions with the offerors in the competitive range.

32. Appellant submitted its "Best and Final" pricing proposal for the contract award on November 17, 1997.

33. The RFP required the offerors to submit Certified Cost and Pricing Data.

34. Appellant's "Best and Final Offer," dated November 17, 1997, sets forth the various unit costs per meal that Appellant expected to be paid based on an estimated 21,500 meals per day.

35. The inmate maximum capacity for the various facilities being served was 6596 + 355 contingency so that the total meals (3 meals per day) served to inmates was a maximum of 20,853, if at maximum capacity.

36. However, every prisoner did not come to every meal. Brian Reynolds testified that from his 20 years of experience in the field, on average, inmates participated in only about 85% of the total allowed three (3) meals per day.

37. DPSCS employees who work eight (8) hours in a twenty-four (24) hour period are eligible for one (1) meal during the work time. DPSCS employees that work at least twelve (12) hours in a twenty-four (24) hour period are eligible for two (2) meals during the work time.

38. The staff population was estimated by Appellant to be approximately 1,100.

39. In November 1997, as a part of the negotiation and discussion process and its submission of cost and pricing data, Appellant made a presentation of its financial estimates and projections underlying and supporting its pricing proposal for the new Contract. Representing Appellant at the presentation were Brian Reynolds, Brion Mathias (Senior Vice President), Jimmy Kessinger (Regional Manager) and Brian Mathiews. Among the State officials present at this presentation were Myles Carpeneto, Procurement Officer for the

captioned Contract, David Bezanson, Deputy Secretary of DPSCS, Richard West, Director of Food Services for DPSCS, and Charles Colison, Correctional Dietary Regional Manager.

40. At this presentation Brian Reynolds distributed a confidential handout showing the costs of inmate meals and staff meals and the revenue for staff meals and inmate meals. Because the handout contained proprietary commercial information including competitive cost data, it was collected at the end of the presentation.

41. At the hearing, Brian Reynolds re-created the confidential handout that was given out at the November 1997 presentation based on his recollection of the handout as well as on how "Best and Final" presentations were always done during his 20 years of experience.

42. The handout was broken down into a profit and loss statement, with separate columns reflecting costs and income for inmate meals and staff meals during the Pre-Renovation Phase, Renovation Phase and Completion Phase (*i.e.,* the post-renovation phase) of the Addendum No. 4 work. It also had a section titled Total Combined Pricing, which added up the profits for all of the phases.

43. The oral presentation and discussion of Appellant's cost estimates and income projections was made by Brian Reynolds who recalled that the presentation took over 2 hours of time.

44. Both Brian Reynolds and Brian Mathiews testified that the presentation clearly showed that Appellant expected and projected receiving income for staff meals.

45. COMAR § 21.05.03.05E(2)(a) provides that "A price or cost analysis should be performed in connection with every negotiated procurement. Cost analysis shall be performed in accordance with § E(2)(c) when cost or pricing data is required to be submitted. Price analysis shall be used in all other instances to determine the reasonableness of the proposed contract price. Price analysis also may be useful in corroborating the overall reasonableness of a proposed price when the determination of reasonableness was developed through cost analysis."

46. "Price analysis" is the process of examining and evaluating a prospective price with or without evaluation of separate cost elements and proposed profit of the individual offeror whose price is being evaluated. COMAR § 21.05.03.05E(2)(b).

47. "Cost analysis" is the review and evaluation of a contractor's cost and pricing data and of the judgmental factors applied in projecting cost or pricing data to the estimated costs, which shall allow the formation of an opinion as to the degree to which the contractor's proposed costs represent what performance should cost, assuming reasonable economy and efficiency. COMAR § 21.05.03.05E(2)(c).

48. When the "Best and Final" offers were opened, Appellant's final amount was more than $12 million less than the competing proposal from Aramark. The Department of Budget and Management Action Agenda presented to the Maryland Board of Public Works for approval of the Contract award shows that Aramark's price proposal was in the amount of $62,734,679 while Appellant's price was $50,226,039.

49. Around December 15, 1997, Mr. Carpeneto, the Procurement Officer, informed Appellant in writing that the State had selected Appellant as the Contract awardee.

50. COMAR § 21.05.02.12C states in part that:

> Confirmation of bid. If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or

a bid unreasonably lower than the other bids submitted.

With regard to proposals, COMAR 21.05.03.03E provides:

> Confirmation of proposals. When, before an award has been made, it appears from a review of a proposal that a mistake has been made, the offeror should be asked to confirm the proposal. If the offeror alleges a mistake, the procedures in COMAR 21.05.02.12 are to be followed.

51. Although the difference between Appellant's offer and that of Aramark was over $12 million dollars C or almost 25 percent C at no time between the opening of the "Best and Final" offers and the selection of Appellant as the awardee did the State's Procurement Officer seek confirmation of the amount of Appellant's offer.
52. Shortly after being notified of the contract award, Brian Reynolds received information from his subordinate that Richard West, the State's Food service Director, had informed Mr. Reynolds' subordinate, that Appellant would not be paid for staff meals under the terms of the new five-year Contract.
53. Brian Reynolds immediately telephoned Mr. Carpeneto to ask why staff meals were not to be paid for under the new Contract. Mr. Carpeneto stated that the State's interpretation of the Contract was that staff meals were not to be paid for under the Contract and only inmate meals would be counted and paid for.
54. Mr. Reynolds indicated that if staff meals would not be paid for under inmate unit prices, as in the previous five-year contract, Appellant would not sign the Contract.
55. Mr. Carpeneto then responded that if Appellant would not execute the Contract, then Appellant would forfeit the bond posted under its offer and be liable for the difference between the Contract price and the price of the next offeror, Aramark, which, he was informed, was over $10 million.
56. During this telephone conversation, Mr. Reynolds brought up the fact that all of the State's officials were silent and made no comments about the lack of payment for staff meals during Appellant's November oral presentation in which the cost data sheet passed out during the meeting showed Appellant's interpretation of the Contract terms and its expectation of payment for staff meals ordered.
57. At some point in the phone conversation, it was mentioned that Appellant had collected all of the cost data sheets after the meeting which allegedly contained language that demonstrated that it was Appellant's interpretation of the Contract language as allowing for payment of staff meals ordered at the same rate as inmate meals.
58. On December 23, 1997, Brian Reynolds sent Myles Carpeneto a formal "Notice of Claim" disputing the fact that Appellant would not be paid for staff meals under the Contract.
59. Brian Reynolds contacted David Bezanson inquiring about the staff meals and was assured that DPSCS would work with Appellant so that Appellant would not lose money.
60. The effective formal Contract date was February 1, 1998.
61. On January 30, 1998, just as the Contract requirement for food service was to begin for the pre-trial or detention side of the Contract, DPSCS decided to change the methodology for the staff meal count.

62. Instead of furnishing Appellant with a written count of staff meals for each facility two hours before each meal, DPSCS sent Appellant an estimate of the total number of staff on each shift, calling this a "standing order."

63. It appears that Mr. Richard West, Director of Food Services for DPSCS, and Mr. Charles Colison, Correctional Dietary Regional Manager, believed such procedure to be consistent with the Contract requirements. We find such procedure to constitute a change to the Contract.

64. Therefore, on July 1, 1998 when the Contract requirement for food service began on the Penitentiary or prison side, DPSCS did not provide a two-hour written count of staff meals for each facility for each meal on that side and again substituted a list of numbers of staff on each shift, again calling it a "standing order."

65. As a result, Appellant never received an accurate count of staff meals needed for each meal for each facility and was thus not able to accurately quantify the number of staff meals needed in advance.

66. Other, non-DPSCS personnel (i.e. visitors, and friends and family of staff) did not pay for meals received.

67. On December 22, 1998, Appellant wrote to the DPSCS that it had documented several occasions where the number of meals being served at the Metropolitan Transition Center (MTC) Cafeteria were in excess of the number ordered by the department because the State failed to adjust their meal count orders in accordance with the increase in inmate dining.

68. Appellant's December 22, 1998 letter went on to recount a discussion with a State official on site about the process used by the State to estimate the number of meals ordered, concluding that the process "comes down to making an educated guess ..." Appellant's letter then requested that it be provided with the Unit Meal Count Sheets used by the Department and indicated that Appellant planned to have one of its supervisors make its own count of meals served. Appellant's letter closed by asking for a proposed solution and prompt response from DPSCS.

69. Appellant again wrote DPSCS's Mr. West about the matter on March 3, 1999. This letter attached documentation allegedly showing that Appellant had served 1414 meals over those ordered for the month of February 1999, as determined by a representative from Appellant counting meals served using a hand counter.

70. Also referenced in this letter was a conversation in January 1999 wherein Appellant assured Mr. West that it would serve the excess number of meals for "obvious security reasons." The letter went on to say: "Additionally, as per that same conversation, we resolved to handle discrepancies at our level after the fact. Thus, I am asking for an additional order in the amount of 1,414 meals for the attached four-week period in February of 1999. I have Pat Donovan preparing a billing invoice in the amount of 1414 meals times $1.264 dollars per meal for a sum of $1787.30."

71. In this letter, Appellant also stated that it would continue to count each inmate meal served during each meal service in the MTC cafeteria using a hand counter and that it would continue to bill for additional inmate meals served until an alternate resolution was presented.

72. By subsequent letter dated November 24, 1999, Appellant stated that since Appellant would not be paid for additional meals served over that which was ordered, it would only prepare the amount of food sufficient to meet the quantity of meals ordered. Thus, the MTC cafeteria would experience meal shortages when more inmates ate in the MTC cafeteria than there

were meals ordered.

73. To rectify this problem, Deputy Secretary Bezanson agreed that the State would purchase, install and monitor the use of turnstiles for the purpose of determining meal counts.

74. Notwithstanding its November 24, 1999 advise that it would only prepare enough food to meet meals ordered, Appellant continued to provide meals for all inmates who ate in the MTC cafeteria. However, the State never installed the turnstiles even though there were three (3) years remaining on the Contract.

75. Brian Mathiews testified that he had several conversations with Mr. West where he offered that Appellant would install the turnstiles so that the actual meals served would be counted. However, this was never done. Mr. Mathiews testified that Mr. West stated that the State did not care how many meals were served or how many meals a turnstile count would discover because Appellant was only entitled to be paid for meals ordered.

76. A determination of the number of meals actually served therefore had to await substantial completion of the Contract before Appellant could reasonably estimate the actual number of meals served but not paid for.

77. Brian Reynolds testified that Appellant's total inmate meal revenue for the 5-year contract was approximately $39,420,000. This figure was based upon one year's worth of invoices.

78. Brian Reynolds further testified that the total potential revenue for staff meals served but never paid was $1,626,000. This figure was based upon an approximate count of 800 staff per weekday with the average price per meal set at $1.20. Thus the total potential revenue per day for staff meals was $960 x 260 weekdays, which equals $249,600 annual staff revenue for weekdays. The approximate number of staff on the weekends was 600 staff per day. Multiplied by the average price per meal of $1.20, the total potential revenue per weekend day was $720. With 105 weekend days annually, the total annual staff revenue for weekends was $75,600. Thus, totaling the annual staff revenue for weekdays and weekends, the total potential annual staff meal revenue not paid was $325,200. Multiplied by 5 years for the total length of the Contract, the total potential staff meal revenue lost was $1,626,000.

79. For the year 1999, Appellant alleges it was required to serve 18,416 more meals than were ordered. These meals were for inmates and non-DPSCS personnel, and thus there is no dispute that such meals were compensable under the Contract. Assuming the lowest price of $1.178 for all of the meals, Appellant was allegedly underpaid $21,694 for 1999. Appellant seeks entitlement to $108,470 for the number of meals the State allegedly under-ordered for the five-year Contract (5 x $21,694 = $108,470).

80. By letter dated February 7, 2000, Appellant filed a "Notice of Claim," alleging that Appellant had provided in excess of 18,000 meals beyond those ordered by DPSCS for the year ending January 31, 2000 (fiscal year 1999).

81. In May 2001, Appellant assigned all of its right and interest under the Contract to Aramark except for its right to equitable adjustments relating to this litigation.

82. Appellant alleges that Aramark lost money on the remainder of the Contract. Respondent disputes this. However, the Board has no reason to doubt Appellant's allegation based on the record.

83. On June 16, 2000, Appellant filed its claim, dated June 14, 2000, for an equitable adjustment to the Contract price for the unpaid staff meals up to that time and under-ordered meals for 1999. Appellant claimed a total of $1,734,470 in lost revenue, which includes the total potential staff meal revenue lost of $1,626,000 and $108,470 for loss of revenue based on an estimate of the number of meals allegedly under-ordered. This total amount does not include

the extended renovation period claim discussed below, wherein the State refused to pay the higher renovation rate beyond the June 30, 1999 original scheduled completion date for the new kitchen facility.

84. The Contract between Appellant and DPSCS required Appellant to renovate the Maryland Penitentiary food service area.

85. Renovation of the Maryland Penitentiary food service area was scheduled under the Contract to be completed by June 30, 1999, and included demolition of Building G, installation of a new loading dock, and renovation of the Penitentiary kitchen.

86. The entire Contract was worth $50,226,039.38, including the renovations and equipment supply portion of the Contract separately bid and awarded in the amount of $5,236,090. There were two separate bonds for the food service and renovation portions of the Contract.

87. The renovation work was scheduled to commence on July 1, 1998 and be completed by June 30, 1999.

88. Chas. H. Tompkins Co., now operating as J.A. Jones/Tompkins Builders, Inc. (Tompkins), was hired by Appellant in February, 1998 to be the subcontractor for the renovation work.

89. The planned sequence of the renovation was: (1) demolition of Building G, (2) construction of the new loading dock, which attached to the lower level of the kitchen, (3) renovation of the lower level of the kitchen simultaneously with construction of the loading dock, and (4) renovation of the upper level of the kitchen.

90. Brian Mathiews wrote a memorandum to Mr. West requesting access to the kitchen facilities on October 14, 1997.

91. Tompkins scheduled the demolition of Building G for July 20, 1998 through August 28, 1998, so that the area could be used as a loading dock while the other areas were being renovated.

92. Payment for the provision of meals was divided into three categories to coincide with the construction: DPDS Pricing Period, DOC/MP Renovation Pricing Period, and Consolidated Pricing Period.

93. The DPDS Pricing period was to last from February 1, 1998 through June 30, 1999 when the renovation work was scheduled to be completed. The price per meal was set at $1.215.

94. The DOC/MP Renovation Pricing Period was to last from July 1, 1998 through June 30, 1999. During this period, the price per meal was set at $1.264.

95. Appellant argues that the word "renovation" was specifically added to the language of Paragraph 1.1.2.2 of the Contract, titled DOC/MP Renovation Pricing Period so that it covered the entire time renovations were being done and not just a one-year period.

96. Appellant also argues that it was the intent of the parties that Consolidated Pricing Period A was to last from the date of actual completion of the renovation work until June 30, 2000. After that, the price per meal was to be reduced to $1.178 and the per-meal prices for Consolidated Pricing Periods B through D were adjusted through a CPI Adjustment provision contained in the Contract.

97. Myles Carpeneto testified that he and Brian Reynolds agreed that the purpose of the differential in pricing was to cover the increased costs of preparing food during the renovation period because the kitchen facilities would not be in full use.

98. The principal apparent purpose of having different meal prices during various periods of time was to compensate for the increased meal costs that would result when the kitchen facilities wouldn't be available during the renovation period.

99. Appellant had to rent kitchen and food preparation trailers during the renovation period at a cost of $17,535 per month and a refrigerated trailer and dry box at a cost of $3,465 per month. The additional cost of renting this equipment was $21,000 per month or $252,000 for the year.

100. Mr. Carpeneto testified that the State expected that the costs would drop after the renovations were completed and that such was an incentive for the contractor to timely complete the renovations.

101. In the spring of 1998 Appellant first became aware of the existence of live utilities that ran in a tunnel underneath Building G but served active, critical facilities other than Building G.

102. The existence of the utility tunnel was not referenced anywhere in the contractual agreement between the parties.

103. Prior to making its best and final offer for the Contract, Appellant representatives made numerous visits to the site and no indication was made that there was a utility tunnel under Building G.

104. A November 22, 1999 photograph taken by Mr. Louis Sidney, Senior Project Manager for Tompkins depicted a trash compactor standing in front of Building G, as well as a compactor pad and a fence. The trash compactor had a metal hood or canopy that hid the outdoor stairs that led to the basement of Building G so that one could not tell from this view that there was a basement in Building G.

105. A December 3, 1999 photograph depicts the same trash compactor, compactor pad and fence but from a farther distance. Mr. Reynolds testified that the photograph accurately depicted the way the work site appeared to him on October 14, 1997 when he first visited the site.

106. Representatives of Tompkins first learned about the existence of the utility tunnel during its site visit on March 9, 1998, when they were shown the tunnel by Mr. Paul Petrick, the acting correctional maintenance office manager for DPSCS.

107. Mr. Thomas Barnes, estimator for Tompkins, testified that upon learning of the basement in Building G, he requested to see as-built drawings of Building G.

108. The State first furnished utility drawings for Building G on March 27, 1998. Mr. Steve Burdette of S.C. Burdette & Associates (S.C. Burdette), the architect on the project for Appellant, received the drawings from Mr. Petrick.

109. S.C. Burdette sent the drawings to its consultant engineers, who conducted a site investigation of the utility tunnel and prepared a report, dated April 9, 1998, explaining the existence of live utilities in the tunnel, including steam and electrical lines that needed to remain in use, and could not simply be capped.

110. The April 9, 1998 report revealed that the utilities were active and passed through the basement of Building G and fed the existing Education and Hospital Buildings. However, these utility lines did not serve any part of Building G itself.

111. By letter dated April 15, 1998, Mr. Curtis Harris, Vice President of Tompkins, informed Brian Mathiews that Building G contained a utility tunnel with active utility systems that would be disrupted by the demolition of Building G.

112. In a letter dated April 19, 1998, Brian Mathiews informed the State that Appellant had become aware of the existence of active utilities and that Appellant expected DPSCS to relocate these utilities prior to the demolition of Building G, which was scheduled to begin in July 1998. We find this letter constitutes timely notice.

113. Under the Contract, all notices to DPSCS were required to be delivered to both the Procurement Officer, Myles Carpeneto, and the Director of Food and Property Services, who

at the beginning of the Contract was Mr. Anthony DeStefano.

114. Brian Mathiews testified that the April 19, 1998 letter was written to the person designated for notice in the Contract, Anthony DeStefano, within 30 days of the time that Appellant or Tompkins was first notified of the existence of live utilities in Building G, which was April 9, 1998.

115. At an April 21, 1998 meeting following this notice, the State attempted to disavow responsibility for the utility issue.

116. By letter dated May 20, 1998, Brian Mathiews requested that DPSCS modify the Contract to pay for the additional design and construction costs associated with the relocating of the utilities.

117. The demolition plan drawings, which were prepared by Appellant and Tompkins on June 30, 1998, showed that demolition would begin after the existing utilities were relocated.

118. By letter dated August 12, 1998, Brian Mathiews stated that Appellant firmly believed that the relocation of the utilities was not a part of its Contract and that Appellant would only perform the work as a change order issued by the State. Appellant initially offered to perform the relocation work for $433,631.

119. By letter dated August 3, 1998, Brian Mathiews requested that Appellant be given an extension of time on the renovation portion of the Contract because Appellant was encountering undisclosed asbestos in Building G.

120. Appellant had first learned of the presence of asbestos in Building G at a renovation meeting on July 16, 1998.

121. Building G could not be demolished until all of the asbestos was abated.

122. Article 17.1.6.3 of the Contract states: "In no event shall the Contractor be responsible for any costs relating to the abatement of such undiscovered environmental hazards." Article 17.1.6.2 of the Contract states that if at any time during the performance of the work the Contractor finds or suspects the presence of environmentally hazardous materials in any work area, the "Contractor shall withdraw all his personnel from the potentially contaminated area."

123. By letter dated August 19, 1998, the State told Appellant that it had completed the removal of all asbestos from Building G.

124. Eventually, Appellant was requested to provide an estimate of the cost of relocating the utilities, which was done on January 8, 1999.

125. On January 15, 1999, DPSCS returned the estimate asking for more detail.

126. The requested breakdown was furnished to the State by letter dated January 18, 1999.

127. At a January 20, 1999 construction meeting, Appellant restated that the utility relocation was on the critical path for construction and therefore any delay in the authorization to proceed causes a day-for-day delay in the completion of the project. Appellant also reiterated that it could not proceed with the utility line relocation work until the change proposal was approved and authorized.

128. By letter dated February 2, 1999, Appellant rejected the State's offer of $150,000 toward the cost of relocating the tunnel and associated utilities. Appellant reiterated its position that the contract modifications under discussion were clearly outside the scope of Appellant's Contract and hence Appellant had no responsibility to bear any part of the cost of the proposed work. Appellant's letter indicated if DPSCS was not willing to compensate Appellant for the work that it could make separate arrangements with another contractor for work.

129. By letter dated April 19, 1999, Appellant submitted another proposal to DPSCS outlining the work to be done and included an offer to begin work pending execution of a formal change order. This offer apparently was not acted upon.

130. At the meeting of May 26, 1999 Appellant advised the State that it was not prepared to proceed with the work until a "hard" contract or change order for the additional work had been issued by DPSCS. The delivery of pipe was postponed pending receipt of the contract or change order, and the project completion was slipping day to day until the change authorization was issued.

131. By letter dated August 24, 1999 Appellant wrote to the Deputy Secretary of DPSCS as follows:

> This is to advise you that Correctional Foodservice Management hereby rescinds and withdraws its offer of April 19, 1999 to demolish a section of the utility tunnel and relocate utilities existing in the area of the future loading dock south of the Maryland Transition Center for the price of $322,291.00.
>
> Our proposal stipulated that we would complete the additional work by July 1999 if a Change Order for the work was awarded by May 24, 1999. Regretfully, four months have passed since this date and we still have not received the Change Order. We have encountered significant additional costs as a result of this delay.
>
> We are compiling a revised proposal to include appropriate time extension and adjustment for the cost of delay. The revised proposal will be forwarded to you by September 1, 1999.

132. By letter dated September 10, 1999, Mr. Carpeneto sent Appellant a contract modification or change authorization for signature covering the relocation of the utilities, which was agreed to by Appellant, in the amount of $322,291. Board of Public Works approval of this contract modification was obtained on September 29, 1999.

133. Shortly thereafter work began on the tunnel relocation in accordance with the contract modification. By letter dated October 28, 1999 Appellant wrote DPSCS telling it that its subcontractor had encountered other unknown and unforeseeable obstructions that were not part of the scope of the changed contract work.

134. These obstructions included an abandoned concrete foundation, stone walls running perpendicular to the trench line and a buried storm sewer, all of which were in the way of the trench line for the relocated utilities. An added item noted that Appellant's proposal had been based on reusable, good backfill from the excavated material, but that Appellant was encountering buried debris and rubble that would make it unsuitable for use as backfill. Appellant's letter concluded with this paragraph:

> Therefore, in accordance with Article XIII of the referenced Contract, this letter shall serve as written notice of Appellant's intent to file a claim for the cost of this additional unforeseen work. We will forward the written claim when the extra work has been completed

and the final costs have been assessed.

135. By letter dated November 4, 1999, Appellant wrote DPSCS noting that part of the contract modification was based on digging up, relocating and revising an existing condensate receiver tank in the basement of Building G.

136. At the contract modification pre-construction meeting, one of the points of discussion was Appellant's skepticism concerning the serviceability of the tank. After the meeting Appellant's subcontractor removed the insulation on the tank revealing a much larger issue. The existing tank was in direct violation of ASME codes for pressure vessels and appeared to have been field fabricated without any of the necessary certifications and approvals. DPSCS was told that neither Appellant nor its subcontractor was willing to assume liability for reinstalling the existing tank.

137. Appellant's letter of November 4, 1999, concluded with this statement:

> This condition was unknown to us at the time of our proposal, nor was it reasonable foreseeable. In accordance with Article XIII of the referenced contract, we hereby notify you of our intention to file a claim for any additional costs or lost time realized as a result of this portion of the work. We are in the process of developing a proposal to supply a new, properly sized, code compliant tank for the project. We will forward this cost information for your review and approval once it is collected.

138. By letter dated November 16, 1999, Appellant wrote DPSCS regarding the relocation work for the steam and condensate lines that were to pass under existing steam and condensate lines going to "C" Block at the prison. When the existing condensate pipe was uncovered, it was leaking badly in a number of locations across the contractor's excavations. Appellant noted that it had not yet unearthed the steam line but judging from the age and condition of the condensate line it was also expected to be a problem.

139. Appellant's letter specifically noted that:

> These concealed conditions were unknown to us at the time of our proposal, nor were they reasonably foreseeable. In accordance with Article XIII of the referenced contract, we hereby notify you of our intention to file a claim for any additional costs or lost time realized as a result of these conditions.
>
> We are continuing to track our costs associated with these unforeseeable conditions. We will forward an official claim at such time as all of the costs are accounted for.

140. By letter dated November 22, 1999 Appellant wrote DPSCS indicating that its subcontractor had encountered an underground obstruction in the form of an abandoned building wall running east to west across the line of the utility trench at the north corner of the education building. Noting that the problem was both unforeseen and unforeseeable Appellant stated that it only became apparent when excavated. Appellant's letter went on to state:

> Therefore, in accordance with Article XIII of the referenced Contract, this letter shall serve as written notice of Appellant's intent to file a claim for the cost and delay associated with this additional unforeseen work. We will forward the written claim when the extra work has been completed and the final costs have been assessed.

141. On November 22, 1999, Tompkins remobilized for the demolition of Building G.

142. By letter dated November 23, 1999, Appellant wrote DPSCS that upon inspection of the building, Tompkins had discovered material on the upper level that appears to contain asbestos. Appellant stated that representatives of the State had assured it earlier that there was no longer asbestos in the building.

143. However, Appellant had not received abatement certificates from the State. Appellant's subcontractor, Tompkins, believed that the material in question did contain asbestos, and it proposed to have samples tested. Appellant's letter dated November 23, 1999 contained a notice reserving its rights to file a claim for delay under Article XIII of the Contract if the tests were positive for asbestos.

144. By letter dated December 1, 1999 Appellant wrote DPSCS sending it test reports showing that the materials in fact did contain asbestos.

145. Appellant further noted that the presence of asbestos had forced it to stop the demolition of Building G as of November 22, 1999 and that it had demobilized pending notification that the asbestos had been removed. Appellant stated that this was likely to substantially delay completion of the construction project. Appellant's letter concluded:

> To mitigate the delays to the project, we request the State to inform us of their plans for the removal of the asbestos and certification of abatement. We will then be able to use this information to reschedule the Work so as to avoid the delay in remobilizing. We will also then be better able to assess the delays and project a completion date.
>
> Please be advised that in accordance with Article XIII of the Agreement, Appellant, again reserves its rights to file a claim for equitable adjustment to the Contract Sum and Contract Duration as a result of these asbestos related delays. We will forward this information once we have been able to proceed with the Work.

146. By letter dated December 13, 1999 Appellant wrote DPSCS enclosing a request by Tompkins for a certification of asbestos abatement, indicating that DPSCS was to re-inspect Building G on December 14, 1999 and that Tompkins was scheduled to remobilize on December 15, 1999.

147. By letter dated December 23, 1999 Appellant informed DPSCS that during an attempt to make a final electrical tie-in of feeders to the hospital, a problem was discovered with the existing hospital wiring.

148. The insulation on the existing wires had pulled away from the conductors, creating an unsafe condition. This condition had been shown to the MTC Maintenance Department who had made arrangements to achieve the necessary repairs. Appellant's letter stated that the repairs had not yet been completed and that as of December 16, 1999 its work was stopped pending

completion of the repairs. Appellant's letter concluded:

> Therefore, in accordance with Article XIII of the referenced Contract, this letter shall serve as written notice of Appellant's intent to file a claim for reasonable compensation and time extension as a result of this delay. We will forward this claim at such time as all costs have been accounted for.

149. Beginning July 1, 1999, the State stopped paying the higher "renovation" rate for meals (*i.e.*, $1.215 vs. $1.178), even though Appellant contended that the actual renovation period had been extended due to the encountering of the aforementioned differing site conditions, which were not contemplated by it at the time of bidding.
150. Appellant continued to bill DPSCS at the higher renovation period price for the period after July 1, 1999, and until the renovations were completed in June 2000.
151. The additional amount Appellant billed DPSCS that was not paid between July 1, 1999 and June 2000 is $377,489.88.
152. Myles Carpeneto testified that the reason the State refused to pay Appellant the higher rate after July 1, 1999, was because the State interpreted the specifications to mean that the renovation period for the higher billing rates was fixed and controlling, and was to end on July 1, 1999 as an incentive for the contractor to finish the renovation by July 1, 1999.
153. If the renovations were completed earlier, according to Mr. Carpeneto's interpretation, Appellant would have still been paid the higher renovation period price through June 30, 1999.
154. Tompkins remobilized in early January 2000, after the utilities were relocated, to start the renovations and demolish Building G.
155. Appellant's "Notice of Claim" letter of February 7, 2000 followed, stating that it could now begin to assess the impact of the delays.
156. Appellant hired construction consultants, Construction Technology Associates LLC (CTA) in July 1999 for the remainder of the construction project. The added construction costs incurred by Appellant totaled $90,030.
157. The construction project was completed by June 27, 2000, within the planned six-month period after the demolition of Building G, *i.e.*, the same duration as Appellant had planned for the work.
158. Tompkins, the construction subcontractor, requested an equitable adjustment of $354,557 stemming from approximately one year of extended performance of the construction. These costs represent Tompkins' costs of extended overhead and escalation (*i.e.*, price increases experienced as a result of performing the work later than planned).
159. On June 16, 2000 Appellant filed its claim, dated June 14, 2000, for an equitable adjustment to the Contract price for the alleged additional costs associated with the construction delays. Appellant's claim totals $1,074,076.88, which includes $354,557 for Tompkins's alleged delay costs, $252,000 for the costs of the rental of the kitchen equipment, $377,489 for the amount of Appellant's invoices submitted to the State at the higher renovation period rate, which were paid at the lower meal rate during the extended renovation period, and $90,030 for additional consultant and bonding costs.
160. As noted above, the June 14, 2000 letter also informed the State that the provision of free staff meals was an ongoing problem and constituted a claim with respect to the costs thereof

up to that time.

Decision

I. Timeliness

A. General Food Service Component

Appellant's notices of claim and claims, as they relate to the food services component of the Contract, were timely filed pursuant to COMAR § 21.10.04.02. This regulation requires that "unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known." COMAR § 21.10.04.02A. The Contract did not provide for a lesser period.

The construction component of the Contract is governed by the provisions of §15-219 of the State Finance and Procurement Article, which provides:

> Except to the extent a shorter period is prescribed by regulation governing differing site conditions, a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.

The Maryland Court of Appeals recently held that a contractor's failure to provide timely claim notice under COMAR § 21.10.04.02A is not a jurisdictional bar to this Board's hearing of an appeal concerning the claim. *See* Engineering Mgmt. Serv. Inc. v. Maryland State Highway Administration, 375 Md. 211, 825 A.2d 966 (2003) (EMS). Instead, the Court held, a contractor's failure to make timely notice was a defense to which theories of waiver and equitable estoppel might apply.

The EMS decision also makes clear that the dates that trigger the notice requirement of COMAR § 21.10.04.02, and what constitutes actual notice to the Procurement Officer, were questions of fact that should only be decided after a hearing on the merits.

In this case, as discussed below, the 30-day notice requirement was met by specific written notices. Furthermore, the State had actual notice of the continuing nature of Appellant's claims.

B. Differing Site Conditions

Under the Differing Site Conditions Clause, upon discovery of a differing site condition a contractor is required to "promptly, and before such conditions are disturbed, notify the procurement officer in writing ..." COMAR § 21.07.02.05 (1). The clause at paragraph (2) further provides that "[n]o claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (1) above." Although the Differing Site Conditions clause is not specifically included in the Contract, the Maryland General Procurement Law mandates that State construction contracts have a Differing Site Conditions clause. *See* §13-218(b) of the State Finance and Procurement Article.

Appellant first learned of the existence of live utilities in Building G when Tompkins received a report from S.C. Burdette, dated April 9, 1998, explaining the existence of live utilities in the tunnel under Building G, which serviced the Prison hospital, Education Building and the State's electric chair. By letter dated April 15, 1998, Curtis Harris, Vice President of Tompkins, informed Brian Mathiews that Building G had been constructed over a tunnel containing live utility systems that would be impacted by the demolition of Building G, if not first relocated.

Four days later, on April 19, 1998, 10 days after learning the basis for Appellant's claim, Brian Mathiews wrote to the Director of Food and Property, Anthony DeStefano. The letter stated that Appellant had become aware of the existence of live utilities that were required to remain in operation, and stating Appellant's expectation that DPSCS would relocate the utilities prior to the demolition of Building G, which was scheduled to begin in July 1998. While the word "notice" is not used, we find the letter serves as notice and puts the State on reasonable alert that a specific problem exists. Therefore, Appellant's notice was "prompt" for the purposes of the Differing Site Conditions Clause.

In addition, Appellant's notice regarding live utilities and other notices regarding conditions encountered also complied with COMAR § 21.10.04.02A because Appellant gave initial timely notices within 30 days of learning of the existence of these differing site conditions. This was true with respect to discovery of asbestos in Building G after the State had told Appellant that it had been abated, the subsurface obstructions encountered when Tompkins was finally able to begin the work of relocating the utility tunnel, the discovery that the condensate receiver tank was non-code-compliant, and the other latent conditions that Tompkins encountered. With respect to all of these conditions, Appellant issued a specific written notice invoking the "Disputes" clause of its contract (Article XIII) and of its intent to file a claim.

Under the Contract, all notices to DPSCS were required to be delivered to both the Procurement Officer, Myles Carpeneto and the Director of Food and Property Services, who at the beginning of the contract was Anthony DeStefano. Brian Mathiews testified that the April 19, 1998 letter regarding the differing site condition was written to one of the persons designated for notice in the Contract, Anthony DeStefano, within 30 days of the time that Appellant or Tompkins was first notified of the existence of live utilities in Building G, which was April 9, 1998. Because *§15-219 supra* does not designate the person to receive the notice, although the claim is to be reviewed by the agency head, we believe the failure to notify the Procurement Officer as required by the Contract may be waived. It does not appear that the State was prejudiced by this failure where the Director of Food and Property Services, and one of the persons designated to receive notice, was notified timely that a problem with live utilities existed.

The attempted quantification of this claim, as well as all other prior notified differing site condition claims, was made by letter dated June 14, 2000, the month when the renovation work was substantially complete. The equitable adjustment sought due to the delay in completing the construction phase of the Contract involving both Appellant and Tompkins was outlined on pages 2-3. The amount requested, $711,675.06, covered the additional costs allegedly incurred by Tompkins resulting from the late demolition of Building G, and the additional costs of Appellant due to the extended construction period of performance and the additional rental of mobile kitchen facilities. Until the renovation work was substantially complete (approximately one year after June 1999,

when it was originally scheduled to be completed), these costs could not be accurately ascertained.

The issue regarding the rate to be paid for the post-July 1, 1999 period surfaced immediately after that date. DPSCS initially rejected Appellant's invoices, but then an arrangement was made to continue the invoicing at the higher rate pending the Department's consideration of the matter. Appellant's claim alleged that David Bezanson, Deputy Secretary of DPSCS, advised Appellant that it could continue to invoice at the higher rates and that DPSCS would pay the higher rates until the renovation was completed. Appellant continued to invoice DPSCS each billing period from July 1, 1999, through completion of the renovation work at the end of June 2000 at the higher rate, although the higher rate was not paid after July 1, 1999.

Submission of an invoice may satisfy the requirement of a written notice of a claim for payment pursuant to COMAR 21.10.04.02, at least if it is submitted to the procurement officer. An invoice is a demand for payment, submitted in writing, asserting as a matter of contract right that there is a debt owed to the claimant by the recipient.

The Contract in this case does not contain a definition of the term "claim" because the instant Contract uses the short form Disputes clause (Article XIII). The long form Disputes clause in COMAR , however, does contain a definition of the term. COMAR 21.07.01.06 B(3) sets forth the following definition of the term "claim":

> As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause. However, if the submission subsequently is not acted upon in a reasonable time, or is disputed as to liability or amount, it may be converted to a claim for the purpose of this clause.

We believe that the language of the two clauses may be considered together even though only the short form appears in the Contract. *See* Maryland State Police v. Warwick Supply, 330 Md. 474, 495-496 (1993).

Thus, in the instant appeal, one may argue that Appellant's invoices, which sought the higher pre- July, 1999 renovation period amount for the actual entire renovation period, constituted a claim because Appellant's entitlement to the higher renovation rate remained in dispute.

C. Meal Estimating System and Staff Meals

On the record it is clear that DPSCS was placed on notice in writing by Appellant as early as December 22, 1998 that there was something wrong with its meal estimating system, i.e., the under-ordering of meals.

As for the quantification of the claim, we observe the instant controversy is a dispute covering a series of continuing events. Appellant's "Quantification of Prior Claims" letter, dated

June 14, 2000, noted that the claim was an ongoing claim that continued even beyond the date of the claim's submission. This letter stated in pertinent part:

> Additional compensation is due for 1998 and 2000. Although the amount is small compared with the size of the contract in general, CFM is concerned that this pattern will continue for the remaining years of the contract, and it is of even greater concern that the under ordering of meals has become progressively more inaccurate, not better over time. Thus, CFM could stand to suffer even more significant losses if DPSCS continues to fail in its duties to order meals based upon reasonably accurate estimates.

Appellant learned that it had been selected as the Contract awardee on or about December 15, 1997, when Myles Carpeneto wrote Appellant indicating the State's intention to enter into a contract with Appellant. Shortly after being notified of that proposed Contract award, on December 17, 1997, Appellant's president, Brian Reynolds received information from one of his subordinates that Richard West, the State's Food Service Director, had informed him that, under the State's interpretation of the new Contract, Appellant would not be paid for staff meals.

Alarmed by this information, Brian Reynolds immediately telephoned Myles Carpeneto, who confirmed that under the State's interpretation of the Contract, staff meals were not to be paid for under the unit prices for inmate meals as under the prior five-year contract. Within a week, on December 23, 1997, Brian Reynolds sent Myles Carpeneto a formal written "Notice of Claim," disputing the fact that Appellant would not be compensated for staff meals during the entire five-year life of the Contract. This letter was plainly intended to be a "Notice of Claim" as the second line states that "this letter constitutes our written notice of claim" and its subject line reads "NOTICE OF CLAIM" in bold, upper case letters. This letter clearly satisfies the requirements of COMAR § 21.10.04.02A as it was filed within 30 days after the basis for the claim was known.

It may be argued that Appellant's December 23, 1997 notice of claim was insufficient because the Contract between the parties had not yet been signed. Because of sovereign immunity concerns, without an approved and executed contract, dispute resolution procedures could be argued not to apply. *See* ARA Health Services, Inc. v. Department of Public Safety and Correctional Serv., 344 Md. 85 (1996). COMAR 21.10.04.02A requires the contractor to submit its notice within 30 days of learning the basis for the claim, and Appellant knew of the basis for its staff meals claim more than thirty days before the Contract was entered into. Appellant should arguably have filed its notice of claim again after the Contract was entered into to avoid any issue of timeliness. However, we will not dismiss the claim because Appellant did not do so.

Regardless of the signing date, it cannot be disputed that a disagreement existed in December of 1997. The conversation between Brian Reynolds and Myles Carpeneto on or about December 15, 1997, in which Mr. Carpeneto advised Appellant of liability for over $12 million in the difference between its offer and Aramark's and bond forfeiture if Appellant attempted to back out of the Contract, clearly demonstrates that the State considered Appellant to be bound to DPSCS's understanding under the Contract that staff meals would not be paid for.

Appellant's claim was also timely filed on June 16, 2000. Indeed, while COMAR 21.10.04.02B requires that a contractor file a contract claim within 30 days of the filing of a notice of claim, the regulation also calls for a contractor's claim to include "[a]ll pertinent data and correspondence that the contractor relies upon to substantiate the claim." COMAR therefore permits the filing of a contract claim (but no later than the time of final payment) where its filing within the stated 30 days is impractical or impossible. In recognition of this, the Board in a number of cases has found claims timely filed where it was either impractical or impossible to file the claim within the second 30-day window so long as it appeared that quantification of the claim was made as soon as reasonably practicable and prior to final payment. *See, e.g.,* Rice Corporation, MSBCA 1301, 2 MSBCA ¶167 (1987); Odyssey Contracting Company, MSBCA 1617 & 1618, 4 MSBCA ¶317 (1992); Orfanos Contractors, MSBCA 1849, 5 MSBCA ¶410 (1996).

In this regard, Appellant asks that the Board recognize that Appellant was denied the necessary information required to perfect its claim for the quantum of staff meals by the alleged unilateral actions of Richard West, Director of Foodservices for DPSCS, and Charles Colison, Correctional Dietary Regional Manager, who denied Appellant the data called for by the Contract (*i.e.,* the two-hour advance notice required under 6.4 of Attachment 3 of the Contract) and, instead, adopted a "standing order" procedure.

While the equitable adjustment for construction delays and the under-ordering of meals served could be accurately quantified in Appellant's June 14, 2000 letter, the changed procedure of utilizing a five-year "standing order" estimating the staff meals prevented an accurate quantification of this issue until the entire contract was substantially performed. Therefore, there is ample basis and justification for Appellant's awaiting the substantial performance of serving unpaid staff meals before quantifying its equitable adjustment request for the additional meal services provided. In this case, after more than two years of performance, Appellant attempted to quantify its various prior food service claim notifications in its June 14, 2000 claim submission. By definition, such quantification could not be complete because it could only capture the costs of the Respondent State's prior alleged breaches regarding unpaid meals, not those that would continue to occur in the future as a result of the static position of DPSCS on the issues.

The quantification of these claims was presented at the hearing which occurred at the end of the five-year Contract period, and, we assume, before final payment. As the State was actually aware of these claims, but did not vary its position for the five years, no prejudice to the State resulted from awaiting a complete quantification at the end of performance.

II. Differing Site Conditions Claim

The Differing Site Conditions clause provides that an equitable adjustment will be made where subsurface conditions at the site differ materially from those indicated in the contract, or which differ materially from conditions ordinarily encountered in similar construction work, such that they cause an increase or decrease in the contractor's cost or time required for performance of any part of the work under the contract. COMAR 21.07.02.05. Appellant's claim arises out of the Contract requirement that called for the demolition of Building G, which was required in order to renovate the Penitentiary food service area.

In April 1998, after the Contract had already been awarded, Appellant first became aware of an underground utility tunnel containing live utilities running through the basement of Building G. The utilities did not serve Building G or the kitchen area but instead served the Education Building, Prison Hospital and State's electric chair, and thus the utility lines could not simply be capped while the building was demolished. Demolition of Building G could not begin without preserving and rerouting the live utility lines that had to remain in operation. This differing site condition was unknown to Appellant at the time it entered the Contract, and we find, base on the record, that Appellant was not responsible, under the Contract as executed, for relocating the utility lines. Appellant was entitled to receive a contract modification or change order directive for the relocation. A period of seventeen months ensued before DPSCS accepted its responsibility and issued a change order to move and preserve the live utilities. As a result of the delay in the demolition of Building G, the overall completion of the renovation project was delayed by approximately one year, until June 27, 2000, in lieu of the originally scheduled date of June 30, 1999. Appellant incurred increased food and food preparation costs, and Appellant and its construction subcontractor, Tompkins, incurred increased construction costs.

Although the Differing Site Conditions clause is not specifically included in the Contract between Appellant and DPSCS, the Maryland General Procurement Law, as noted above, mandates that every state construction contract have a Differing Site Conditions clause. In this regard we also note that COMAR contains a group of contract clauses that are mandated for every Maryland construction contract. Among them is COMAR 21.07.02.05 containing a Differing Site Conditions clause.

The Differing Site Conditions clause was the subject of some discussion in Dep't of Gen. Serv. v. Harmans Assoc. LP, 98 Md. App. 535 (1993), involving a decision of this Board. Therein the Court of Special Appeals noted:

> Maryland has adopted the general rule that contracts are made with reference to existing law and that laws affecting particular contracts are incorporated by implication in them. *Denice v. Spottswood I. Quimby, Inc.*, 248 Md. 428, 237 A2d 4 (1968). *See also* 17A Am Jur2d *Contracts*, § 381. In a series of cases beginning with *GL Christian & Assoc v. United States*, 312 F2d 418, 160 Ct. Cl. 1 (1963), the Federal courts have adopted the more specific rule that, where procurement regulations adopted pursuant to statutory authority require that a contract contain a particular clause, the contract must be read as though it contained the clause, whether or not the clause was actually written into the contract. [citations omitted]
>
> This approach is not only consistent with *Denice, supra*, but is necessary for a proper implementation of the State procurement laws. The General Assembly has, by law, required a site conditions clause to be included in every State construction contract, presumably for the reasons noted in the *Foster Constr.* case. Although the Board of Public Works has the authority, through its regulations, to draft the

> specific language of the clause, which it has done, neither the Board nor DGS is empowered to dispense with the clause altogether where the contract in question is a construction contract. To hold otherwise would be to permit Executive agencies to ignore the clear legislative mandate.

Id. at 551.

One might argue that the Differing Site Conditions clause was not required in the present Contract, notwithstanding the mandates of the legislature, because the larger part of the Contract was for food service. However, if a State agency could violate the clear mandate of procurement law and avoid mandatory contract clauses by incorporating construction work into other service contracts, the power of the legislature would be rendered totally void and ineffective, so such an argument must be rejected.

In accordance with the so-called *Christian* doctrine discussed in the Harmans case above, although the Contract did not include a Differing Site Conditions clause, the Maryland legislature clearly intended that all State construction contracts contain that clause, and it was to be incorporated as part of the construction component of the Contract. Even if the larger component of the Contract was the provision of food services, the construction component, we find, was a severable portion and thus was to comply with the legislature's requirements for construction contracts. The language of the Contract and the Board of Public Works authorization of the change are consistent with the view that the construction work was a severable part of the Contract that needed to comply independently with the laws applicable to such contracts. Specifically, the Board of Public Works added the $322,291 change authorization only to the $5.1 million construction project. We further determine that the no damages for delay clause set forth at Article XVII (The contractor agrees [that] no charges or claims for damages shall be made by it for any delays or hindrances from any cause...) is overridden by the constructive Differing Site Conditions clause which must be read into the Contract.

The mandatory COMAR Differing Site Conditions clause recognizes two types of differing site conditions: (1) "subsurface or latent physical conditions at the site differing materially from those indicated in this contract" (Type 1); and (2) "unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract" (Type 2). COMAR 21.07.02.05.

COMAR mandates that the government make "an equitable adjustment" if the circumstance of a differing site condition causes "an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract...." COMAR 21.07.02.05(1). Thus, when a differing site condition causes a contractor increased costs of performance, delays his completion of the work, or both, then the State is required to adjust the contract price, the schedule, or both, as appropriate.

It is true, as argued by DPSCS, that the Contract contained a provision (site investigation clause) that Appellant acknowledged that it had inspected the project site and made itself knowledgeable with respect to those factors which might influence the conduct of the work. *See*

COMAR 21.07.02.06. However, in the present case, the subsurface condition of the live (and remaining in use) underground utilities qualifies as both a Type 1 and a Type 2 differing site condition. The live utilities are a Type 1 condition in that they were not depicted on the Contract drawings provided to Appellant for bidding. They are also a Type 2 condition. As Louis Sidney (Tompkins' project manager) testified, it is not unusual to encounter utilities that need to be cut or capped when demolishing a building. However, it is unusual to encounter live utilities feeding other in-use facilities under an otherwise unused building slated for demolition. In this case, the lines in question did not even serve any part of Building G or the kitchen building, yet they needed to be preserved because they did serve other critical facilities.

Appellant had no reason to believe that it would discover live, active utility lines under Building G servicing other facilities and that those lines could not be cut or capped, and would have to be relocated so that the building could be demolished and the new loading dock serving the new kitchen facility could be built. Thus, the discovery of live utility lines requiring relocation was a Type 2 condition, as well as an undisclosed Type 1 condition.

The initial RFP issued in June 1997 contained a list of drawings for inspection. The drawings listed in the RFP related to the kitchen and its renovation, but no mention was made of Building G.

About a month later, at the pre-bid Question & Answer session, Aramark asked DPSCS whether it had any drawings on underground utilities. DPSCS answered that it did not have any information that was reliable. Indeed, the idea for demolishing Building G and constructing a loading dock was allegedly Aramark's. Then in Addendum 4 to the RFP, DPSCS made the demolition of Building G a Contract requirement. However, the State did not provide any new information on the site conditions for the new work added by the Addendum.

The State cannot remain silent, withholding vital information, while offerors are bidding on Maryland public works projects. Testimony at the hearing in this appeal, however, revealed that the State knew B but failed to disclose B the existence of active utility lines running beneath Building G prior to Contract award. Mr. Paul Rauser, a State Building Construction Engineer who oversaw construction of the project in 1998, testified that he knew about the existence of the utility tunnel in 1997. Additionally, Mr. Paul Petrick, the acting maintenance manager of the Maryland Penitentiary, told Tompkins representatives about the existence of the utility tunnel at lunch during a site visit in March of 1998. The record thus reflects that the State failed to disclose material information to Appellant about which it had superior knowledge regarding the utility tunnel and the existence of live utilities that had to remain in use, and this non-disclosure prevented the demolition of Building G until the lines were relocated.

Even after Appellant discovered the active utility lines beneath Building G in March 1998, the State failed to cooperate. By letter dated May 20, 1998, Brian Mathiews requested that DPSCS modify the Contract to pay for the additional design and construction costs associated with relocating the live utility lines under Building G. However, it was not until almost a year and a half later, on September 29, 1999, that the Board of Public Works approved the contract modification for relocation of the utilities. During that period, Appellant incurred additional expenses associated with the preparation of food because the kitchen facilities were unavailable while the renovations were being completed.

The State also failed to promptly remove asbestos from Building G, causing further delay and expense to Appellant. Article 17.1.6.3 of the Contract puts the responsibility of asbestos removal on the State. The provision states: "In no event shall the Contractor be responsible for any costs relating to the abatement of such undiscovered environmental hazards." Related to this provision is Article 17.1.6.2 which states that if at any time during the performance of the work the Contractor finds or suspects the presence of environmentally hazardous materials in any work area, the "Contractor shall withdraw all his personnel from the potentially contaminated area."

Citing these provisions, Mr. Mathiews wrote a letter to the State, dated August 3, 1998, requesting an extension on the renovation portion of the Contract due to the notification by DPSCS of asbestos abatement in Building G. Appellant first learned of the presence of asbestos in Building G at a renovation meeting on July 16, 1998. Building G could not be demolished until the asbestos was abated. However, the State failed to completely abate the asbestos in Building G until October 1999 causing further delay to the utility relocation work.

Appellant seeks an equitable adjustment of $444,587 for the additional costs associated with the construction delays. This includes $354,557, which represents Tompkins' costs of overhead and escalation (*i.e.*, price increases incurred because the work was performed later than planned), stemming from its extended performance on the project, and profit. It also includes the added consultant and bonding costs, which totaled $90,030 for the hiring of construction consultants, Construction Technology Associates LLC (CTA) in July 1999 for the remainder of the construction portion of the project. We find these costs to be reasonable, and they have not been seriously challenged by DPSCS. Accordingly, subject to a deduction for lack of diligence on Appellant's part in proceeding pending resolution of the dispute under the Disputes clause of the Contract and COMAR 21.07.01.06, we shall award an equitable adjustment. The amount sought by Appellant is $444,587 ($354,557 + $90,030 = $444,587). However, Appellant is required under the State's disputes procedure to continue to perform pending resolution of disputes.[3] Based on the record, it appears that Appellant could have proceeded with the relocation work on or about May 10, 1999 rather than refusing to proceed pending its negotiations with the State over cost. Appellant commenced relocation work shortly after receiving a contract modification for the work on or about September 10, 1999. We will make an adjustment to Appellant's equitable adjustment for the approximate four month delay in the commencement of the required relocation work. The record does not permit us to make a precise calculation in this regard. However, the Board where appropriate, as here, will apply a jury verdict approach. *See* Orfanos Contractors, MSBCA 1849, 5 MSBCA ¶410 (1996) at pp. 18-19. Accordingly, applying a jury verdict approach, we will reduce the requested equitable adjustment of $444,587 by 40%, approximating as a percentage four months of a total of ten months required for the relocation and demolition work from September, 1999 to June, 2000. Forty percent of $444,587 is $177,835. Deducting this from the requested equitable adjustment results in an award of $266,752 ($444,587 - $177,835 = $266,752).

[3] Appellant had invoked the dispute resolution process by filing its notice of claim. In so doing, its rights were preserved even if the Board of Public Works had not agreed to the contract modification. Compare ARA Health Services, Inc. v. Department of Public Safety and Correctional Serv., *supra*.

III. Renovation Period Pricing Claim

Appellant was entitled to be paid a higher rate for meals ordered during the renovation Period. The Contract was designed so that payment for the provision of meals was divided into three categories to coincide with the construction: the DPDS Pricing Period, the DOC/MP "Renovation" Pricing Period, and the Consolidated Pricing Period. Originally, the DOC/MP "Renovation" Pricing Period was to last from July 1, 1998 through June 30, 1999, and during this period the price per meal was set at $1.264.

However, the late discovery of the live utilities requiring preservation beneath Building G, combined with the delay by the State in resolving that problem, as well as the other conditions encountered (i.e. asbestos, concrete foundation, stone walls, condensate receiver tanks, unsafe wiring), postponed completion of the construction work. Thus, Tompkins did not remobilize to begin work to demolish Building G until January 3, 2000, and the renovation work was not completed until June 27, 2000, approximately one year later than planned.

Here, one apparent purpose of having different meal prices during different periods of time was to compensate for the increased meal costs that would result during the period when the kitchen facilities would not be available because of the uncompleted renovations. The Procurement Officer expressed his opinion that the State expected that the costs would drop after the renovations were completed because the Appellant would then be working in the new kitchen. Mr. Carpeneto also testified to his belief that the higher priced meal costs during the renovation period would serve as an incentive to the contractor to timely complete the renovations because if the renovations were completed prior to July 1, 1999, Appellant would still be entitled to the higher amount although the cost of producing the meals would have gone down due to completion of the renovations and the new kitchen. However, clearly one purpose of having separate meal prices during the renovation period was to account for the increased costs associated with the food preparation off-site while the kitchen facilities would be unavailable.

When the renovation period ran over in time and extended for approximately one year because of the discovery of the live utility lines under Building G, Appellant reasonably expected that it would be paid the renovation period unit price until the renovations were completed. Thus, Appellant billed DPSCS at the higher renovation period price for meals after July 1, 1999, and until the renovations were completed. However, beginning July 1, 1999, Appellant was never paid the higher rate for meals even though the renovations had not been completed due principally to the differing site live utility situation.

Mr. Carpeneto testified that the reason the State refused to pay the higher rate after July 1, 1999 was because the State interpreted this section to mean that the dates were fixed and controlling with the intent that such would be an incentive to the contractor to get the renovations done in less than the one-year period. As mentioned above, it was Mr. Carpeneto's opinion that if the renovations were completed earlier than scheduled, Appellant would still have been paid the higher renovation rate through June 30, 1999. This bonus-type concept, however, was apparently never discussed in contract negotiations. In any event, it does not appear that Appellant was ever informed of such intent.

Appellant asserts it is entitled to an equitable adjustment for the additional costs Appellant incurred during the renovation period. Appellant billed DPSCS the higher renovation period price for meals past July 1, 1999 and until the renovations were completed in June 2000. The additional amount Appellant billed DPSCS and was not paid between July 1, 1999 and June 2000 is $377,489. In addition, Appellant rented kitchen and food preparation trailers during the renovation period at a cost of $17,535 per month and a refrigerated trailer and dry box at a cost of $3,465 per month. The additional cost of renting this equipment was $21,000 per month or $252,000 for the year. Thus, the total amount Appellant seeks for the renovation period is $629,489.

However, it is the opinion of the Board that the purpose of the higher renovation period price for meals was to compensate Appellant for the additional expenses associated with the preparation of food because the kitchen facilities were unavailable while the renovations were being completed. Such higher price, we find, would encompass the $17,535 per month trailer rental cost and $3,465 per month dry box rental cost for both the initial contemplated period up to July 1, 1999 and the extended period due to the differing site conditions. To pay for the rental costs during the extended period in addition to the extra meal price could represent a double payment. We therefore deny Appellant's request for an equitable adjustment as it relates to rental costs of $252,000 for the extended year from July 1, 1999 to late June, 2000. We will otherwise sustain in part Appellant's request for an equitable adjustment. Appellant seeks the amount of $377,489 based on the higher meal price of $1.264, as reflected in Appellant's invoices, for the period July, 1999 through June, 2000. However, as is the case with the construction costs during this period, a downward adjustment must be made due to Appellant's failure to diligently proceed under the disputes resolution process which envisions the Appellant proceeding while the differing site conditions claim is under review pursuant to the Disputes clause of the Contract and COMAR 21.07.01.06.

We believe Appellant could and should have proceeded with the relocation work four months sooner than it did. Once again, applying a jury verdict approach, we shall reduce Appellant's equitable adjustment request by the amount sought in the last four months of invoices (January 31 - May 28, 2000) at the higher meal rate of $1.264 rather than $1.178. Based on the records presented to the Board it appears that the difference or "variance" between the higher and lower meal rates for the last four months of invoices is $125,376. Accordingly, we shall deduct the amount of $125,376 from the higher meal rate adjustment sought of $377,489, leaving a total equitable adjustment of $252,113 ($377,489 - $125,376 = $252,113) for the higher meal price during the period of July, 1999 to January, 2000.

IV. Under-Ordering of Meals Claim

Appellant asserts that it was required to serve 18,416 more inmate meals than were ordered and that, with the lowest price of $1.178 for all of the meals, it was underpaid $21,694 for 1999. Using this compilation for calendar year 1999, Appellant argues it is entitled to a total of $108,470 for the amount of inmate meals the State under-ordered over the five-year period of the Contract (5 x $21,694 = $108,470).

While it is clear that there was some under-ordering of inmate meals, the record does not permit the Board to distinguish inmate meals from non-DPSCS staff meals in this regard. We have no confidence in what is essentially an estimate based on a single month's hand counting in

February, 1999 for inmate meals actually served above what was ordered over a five-year period. There is also some evidence of record based on testimony and evidence produced by Mr. Colison to suggest that over the life of the Contract more inmate meals may have been ordered than actually served. Accordingly, we deny this claim on its merits.

V. Staff Meals Claim

Paragraph 6.4 of Attachment 3 of the Contract provided that 2 hours before each meal the State would furnish the contractor with a written count of the number of staff meals for each facility so that the contractor could determine the number of staff meals to prepare for each facility. On January 30, 1998, just as the Contract requirement for food service was to begin for the pretrial or detention side of the Contract, the State made unilateral changes to the Contract procedure regarding meals ordered. Instead of furnishing Appellant with a written count of staff meals for each facility two hours before each meal, DPSCS sent Appellant a list of the total number of staff on each shift, calling this a "standing order."

Later, on July 1, 1998 when the Contract requirement for food service began on the Penitentiary or prison side, DPSCS again failed to provide the two hour written count of staff meals for each facility for each meal on that side and again substituted a list of numbers of staff on each shift, again calling it a "standing order." As a result, Appellant never received an accurate count of staff meals needed for each meal for each facility and thus, Appellant was never able to accurately quantify the number of staff meals needed until after each meal. Because DPSCS did not furnish a written count for staff meals as contractually required two hours before each meal, Appellant alleges that it had difficulty in determining whether it was providing meals to non-DPSCS personnel.

On December 22, 1998, Appellant wrote to the DPSCS that it had documented several occasions where the number of meals being served at the Metropolitan Transition Center (MTC) Cafeteria were in excess of the number ordered by the Department because the State failed to adjust their meal count orders in accordance with the increase in inmate dining. Under the Contract, Appellant was required to use "meal counts ordered" as the figures for billing purposes. Appellant's December 22, 1998 letter went on to recount a discussion with a State official on site about the process used by the State to estimate the number of meals ordered, concluding that the process comes down to making an educated guess. Appellant then requested that it be provided with the Unit Meal Count Sheets used by the Department and stated that Appellant planned to have one of its supervisors make its own count of meals actually served and would only serve more meals in the MTC cafeteria when the number of meals served reached the number of meals ordered upon a written request from an authorized Department representative. Appellant's letter closed by asking for a proposed solution and prompt response from DPSCS.

Appellant's next letter was dated March 3, 1999. This letter attached documentation showing that Appellant had served 1414 inmate meals over those ordered for the month of February, 1999, as determined by a representative from Appellant who counted each meal served using a hand counter. Also referenced in this letter was a conversation between Mr. Mathiews and Mr. West in January, 1999 wherein Appellant assured the Department that it would serve the excess number of meals for "obvious security reasons." The letter went on to say: "Additionally, as per that same conversation, we resolved to handle discrepancies at our level after the fact. Thus, I am asking for an additional

order in the amount of 1,414 meals for the attached four-week period in February of 1999. I have Pat Donovan preparing a billing invoice in the amount of 1414 meals times $1.264 dollars per meal for a sum of $1787.30." Appellant closed by stating that it would continue to count each inmate meal served during each meal service in the MTC cafeteria using a hand counter and that it would continue to bill for additional inmate meals served until an alternate resolution was presented.

By letter dated November 24, 1999, Appellant stated that since Appellant would not be paid for additional meals served over that which was ordered, it would only prepare the amount of food sufficient to the quantity of meals ordered. Thus, the MTC cafeteria would experience meal shortages when more inmates ate in the MTC cafeteria when more inmates showed up in the cafeteria than there were meals ordered. Meal shortages would lead to potentially explosive situations.

To address these potential inmate problems and Appellant's financial concern, Deputy Secretary David Bezanson had agreed to the use of turnstiles for the purpose of determining meal counts. However, although the State received the turnstiles, the turnstiles were never installed even though there were three years remaining on the Contract. Brian Mathiews testified that he had several conversations with Richard West where Appellant offered to install the turnstiles provided the meals would be counted, but this was never done. Mr. Mathiews testified that Mr. West stated that the State did not care how many meals were served or how many meals a turnstile count would discover because Appellant was only entitled to be paid for meals ordered.

For the foregoing reasons, Appellant argues that the number of DPSCS staff meals actually served had to await substantial completion of the Contract before Appellant could reasonably estimate the actual number of meals served but not paid for. We agree, and thus, as indicated above, find the claim to be timely.[4] We must also, of course, find that the Contract contemplates payment for staff meals.

Appellant's interpretation that it is entitled to payment for staff meals results partly from its reading of the terms of the Contract. The plain ordinary meaning of the words used in a contract that is not ambiguous will control. *See* General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985); C.J. Langenfelder & Son, Inc., MSBCA 1636, 4 MSBCA ¶322 (1993) at p. 12. It is a general rule that where a contract is susceptible to two different interpretations, each of which is consistent

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[4]Appellant likewise asserts that its claim for staff meals it was required to serve to non-DPSCS personnel had to await substantial completion of the Contract before Appellant could reasonably estimate the actual number of such meals served. While we agree on this assertion, we will deny the claim on its merits.

We find that Appellant is not entitled to an equitable adjustment based upon charges for staff meals served to non-DPSCS personnel because it failed to avail itself of its right under the Contract to collect a meal charge from such persons. Under the Contract, DPSCS could authorize non-DPSCS personnel to eat in the Officer Dining Rooms and:

> The Contractor [was] authorized to collect, and retain, from non DPSCS personnel reasonable charges for staff meals served to those personnel.

Contract, Attachment 2 ¶6.2. The Contract imposed no obligation on DPSCS for collecting or safeguarding the charges collected from non-DPSCS personnel. Indeed:

> The Contractor agrees that it assumes full responsibility and liability for all money and taxes associated with the provision of non-DPSCS personnel meals....

Contract, Attachment 2 ¶6.4. Furthermore, by way of the simple expedient of checking ID badges, Appellant could have determined which personnel were non-DPSCS personnel from which meal charges could be collected.

with the language of the contract, the contract is ambiguous. Cherry Hill Construction, Inc., MSBCA 2025/2048, 5 MSBCA ¶468 (1999); Sun Shipbuilding & Dry Dock Co. v. United States, 393 F.2d 807, 818 (Ct. Cl. 1968) (citing Bennett v. United States, 371 F.2d 859, 861 (Ct. Cl. 1967)). Here, the ambiguity lies in conflicting parts of the Contract regarding payment for staff meals.

Section 6.4 of the Contract states that "Staff meals shall not count as meals ordered." Other relevant provisions of the Contract provide:

> The Contractor shall, without additional charge to the Department or the employee, provide meals for DPSCS employees who have official business at a facility covered under this contract.
>
> The Contractor may invoice only for meals ordered by the Department, not for meals received by the Department.

The RFP stated:

> Please remember that STAFF meals will not be counted as meals ordered; however the Contractor will be required to prepare and serve the STAFF meals.

The RFP also provided by way of specifications presented in the form of a proposed contract that:

> The Contractor shall provide meals for employees and official visitors as authorized by institutional policies.
>
> During each Pricing Period the Contractor may invoice the Department monthly for the Pricing Period's Price Per Meal ordered during that Pricing Period.
>
> STAFF Meals shall not count as meals ordered.

Were that all the Contract language on the issue, the plain meaning of the words would control such that there would be no ambiguity, and under the plain meaning of the words used, staff meals would not be paid for as they would not be meals ordered. This plain meaning of the language used would control regardless of what understanding the parties may have had regarding what the Contract meant. However, Attachment #8 of the Contract contains the form of the standard menu invoice to be used by the contractor in billing for "meals ordered." The standard menu invoice, which was identical to the invoice used under the prior contract, has a column for the "number of meals ordered" during the month, but it does not specify the number of inmate meals ordered during the month. Focusing on Attachment #8 of the Contract, it appears that all meals ordered, including all staff and inmate meals, would be counted for purposes of payment. Indeed, if staff meals were not to be counted, as the State argues, there should have been a column for staff meals ordered on the standard menu invoice. It would have been less confusing for the State to simply have said the contractor will provide staff meals for free rather than to base payment on meals ordered and exclude staff meals from meals ordered. The State did not simply so say that staff meals would be

provided for free because the record reflects that the State understood that staff meals would be paid for but expected the contractor to place such costs in its inmate meal pricing.

In any event, we conclude that the provisions of the Contract dealing with the staff meals issue cannot be considered unambiguous. We thus reject the State's position that the language unambiguously precludes payment for staff meals and that offerors should have understood that to get paid for staff meals the cost of such meals should have been estimated and included in the price for inmate meals. In this regard, we also note the numbering error and Mr. Carpeneto's correction thereof in the question submitted by Aramark during negotiations regarding payment for staff meals and the terse and possibly confusing answer provided.

All that said, however, a contractor's interpretation of the ambiguous language must still be reasonable and actually relied upon in compiling its bid or offer. Cherry Hill Construction, Inc., *supra*. Was Appellant's interpretation reasonable and actually relied upon in compiling its price offer?

Here, Appellant's new Contract was structured in the same manner as the previous incumbent contract with similar terms for the payment of meals ordered by the State. Appellant's president, Brian Reynolds, testified that "the wording in the contract was almost identical to the previous contract." In addition, as noted above, the form of the standard menu invoice to be used by the contractor in billing for "meals ordered," was identical to the form used in the prior contract.

Appellant's interpretation that it would receive compensation for staff meals may be considered reasonable because this is how it was done in the past. During the length of its previous five-year contract with DPSCS, Appellant was paid for staff meals. Payment for staff meals was also commercially reasonable. Mr. Reynolds further testified that of the 250 contracts that he had been involved in over his 20 years in the business, he never entered a contract where staff meals were provided for free, and in his experience it would be "absurd" to not charge for staff meals. Appellant had always been paid for staff meals in the past, and there was no indication by anyone from the State that Appellant would only be paid for inmate meals. We find that Appellant's interpretation that it would be paid for staff meals is reasonable and that it relied on its interpretation in compiling its price offer.

Throughout the entire contract negotiation process, and pre-negotiation pre-proposal meetings, not one representative of the State advised Appellant that it was not going to be paid for staff meals under the new Contract. The Board will construe the ambiguity against the drafter at least where the contractor's interpretation is reasonable and particularly when the State is aware of a contractor's interpretation at the time of execution. The record reflects herein that there were several instances during the negotiation process where Appellant indicated that it expected to be paid for staff meals and where the State was made aware of Appellant's interpretation, yet the State remained silent about its interpretation until after Appellant had been determined to be the Contract awardee. In this regard, we note that the Procurement Officer for the instant procurement was also the Procurement Officer for the previous contract where Appellant was the incumbent and was entitled to payment of staff meals thereunder.

The procurement was a negotiated procurement, which required the competing offerors to submit certified cost and pricing data as an integral part of their proposals. In November, 1997, as a part of the negotiation and discussion process Appellant made a presentation of its financial estimates and projections underlying and supporting its pricing data for the new Contract. At the outset of the presentation, Appellant distributed a data sheet containing its cost estimates and income projections. The data sheets were returned at the conclusion of the presentation. The presentation and discussion of Appellant's cost estimates and income projections was made by Appellant's president, Brian Reynolds, who recalled that the presentation took over two hours to complete. Also present was Appellant's Chief of Operations, Brian Mathiews. Both of these witnesses testified that the presentation showed that Appellant expected and projected receiving income for staff meals.

This oral presentation was given in November, 1997 to a number of State officials who were members of the evaluation committee charged with evaluation and recommendation for contract award under the procurement. Among the State officials present at this presentation were Myles Carpeneto, the State Procurement Officer, David Bezanson, the Deputy Secretary of DPSCS, Richard West, Director of Foodservices for DPSCS, and Charles Colison, Mr. West's Assistant and Correctional Dietary Regional Manager. Each of these State officials present at the November presentation received the data sheet distributed by Appellant at the beginning of the meeting. However, the record reflects that while these cost data sheets were passed out showing Appellant's interpretation that it expected to be paid for staff meals under the new Contract, State officials kept silent and made no comment about an intention not to pay for staff meals.

We also recognize that each of the State witnesses at the hearing were members of the evaluation committee appointed to make selection recommendations under the negotiated procurement. Moreover, the financial data presentation was not a random or fortuitous act. Instead, it was an integral part of the selection process for the negotiated procurement. Appellant invites the Board's attention to its Exhibit 9, a copy of the Agenda submitted by the procurement officials of the State to the Board of Public Works for approval of the procurement. On the second page of this Agency-created document there appears the point scores for financial proposals assigned by the Agency's procurement evaluation committee to Appellant and to Aramark, the other offeror in the procurement deemed by the State to have submitted an offer reasonably susceptible of being selected for award.

The significance of these point scores for the financial proposals should not be overlooked, particularly in light of the fact that certified cost and pricing data were required in the instant procurement. *See* COMAR 21.05.03.05E.

The record in this case makes it clear that the State's procurement officials knew of Appellant's contract interpretation regarding payment for staff meals under the Contract by reason of having listened to Appellant's oral presentation and having performed the necessary analysis of the company's certified cost and pricing data and assigning point scores to the company's financial proposal.

Furthermore, the State should also have become aware of Appellant's interpretation that staff meals would be included in the Contract when Appellant submitted its "Best and Final" offer, dated November 17, 1997, which set forth the estimated meals per day that it would be paid for as 21,500

estimated meals per day. The inmate maximum capacity for the various facilities being served was estimated in Appellant's October 15, 1997 proposal to be 6596 + 355 contingency, so that the total number of meals (3 meals per day) served to inmates was estimated as a maximum of 20,853. The record in this regard reflects that, on average, inmates could only be expected to participate in only about 85% of the total allowed three meals per day. Thus, in order to achieve the estimate of 21,500 meals, staff meals must be included.

Based on the foregoing, Appellant argues that it was the duty of the State's procurement officials to resolve the differences with Appellant long before making its decision to award it the Contract. COMAR 21.05.03.05D provides:

> **Objective of Negotiations**. Complete agreement of the parties on all basic issues shall be the objective of the negotiations. Except as provided in Regulation .02A(4), discussions shall be conducted with qualified offerors to the extent necessary to resolve uncertainties relating to the procurement, including proposed price.

The record reflects that the State did not attempt to resolve the uncertainty concerning the controversy relating to the payment for staff meals and the prices to be paid for staff meals during negotiations. This potential violation of COMAR 21.05.03.05D was accompanied by the State's failure to obtain Appellant's confirmation of its "Best and Final" Offer in light of the disparity between Appellant's price of $50,226,039 and Aramark's offer of $62,734,679.

This difference of over $12 million dollars or nearly 25 percent between the two competing offers should have raised a clear warning to the State's procurement officials conducting the procurement. However, the record reflects that the State procurement officials were not concerned about the discrepancy between the offers and justified the difference on the ground that Aramark's price was higher the last time it bid on the contract five year earlier. However, there is no evidence in the record that Aramark's offer was not made in good faith or not intended to be considered seriously or that it was not seriously considered.

It is apparent that one of the primary factors resulting in the $12 million difference between the financial offers was due to the fact that Appellant had not calculated that staff meals would have to be provided at no costs and that a significant contingency had to be included in the unit costs of inmate meals to insure that Appellant would be compensated for the speculative amount of staff meals to be served without compensation.

In situations like these, COMAR requires the State agency to confirm a contractor's bid or proposal. COMAR 21.05.02.12; COMAR 21.05.03.03E.

Had the procurement officials followed COMAR and performed the price and cost analysis mandated by those regulations, they could not have failed to become aware of Appellant's interpretation regarding the payment of staff meals ordered.

Under such circumstances, we shall hold that the State is estopped from relying upon a contrary interpretation of the Contract. The doctrine of equitable estoppel was "educed to prevent the unconscientious and inequitable assertion of rights or enforcement of claims which might have existed or been enforceable, had not the conduct of a party, including his spoken and written words, his positive acts and his silence or negative omission to do anything, rendered it inequitable and unconscionable to allow the rights or claims to be asserted or enforced." Johnson Lumber Co. v. Magruder, 218 Md. 440, 448 (1958).

To claim the benefit of the doctrine of equitable estoppel, one must have acted in good faith and with reasonable diligence, *Id.* at p. 448, as the record demonstrates Appellant has.

For all of the foregoing reasons we construe the ambiguity regarding payment for staff meals against DPSCS, the drafter.

As Appellant demonstrated at the hearing through Appellant's Exhibit 16 and the testimony of Brian Reynolds, Appellant served an average of 800 meals per day to DPSCS employees on both the prison and detention sides of the Contract.[5] The average price for the meals was $1.20. Thus, Appellant lost $960 per weekday as a result of not being paid for staff meals (800 x $1.20 = $960). Appellant also served 600 staff meals each weekend day, resulting in a loss of $720 per weekend day for staff meals served but not paid for (600 x $1.20 = 720). There are 260 weekdays each calendar year, and 105 weekend days. Therefore, Appellant lost $249,600 (260 x $960) on weekday staff meals, and $75,600 (105 x $720) on weekend staff meals, or a total of $325,200 per year. Over the five-year life of the Contract, therefore, Appellant lost a total of $1,626,000 for staff meals served but not paid for.[6] The State did not audit Appellant's claims prior to the hearing. Both entitlement and quantum were tried at the hearing, and throughout the course of the appeal, the State never contested Appellant's quantum calculation. Accordingly, with respect to the foregoing staff meals claim for which Appellant has established entitlement, the State should pay Appellant the full quantum of the claim.

IV. Claim Summary and Pre-Decision Interest

In summary, Appellant's claims (before interest) to which entitlement is established are as follows:

Differing Site Conditions Claim	$ 266,752
Renovation Pricing Period Claim	$ 252,113
Staff Meals Claim	$1,626,000
TOTAL:	$2,144,865

[5] In contrast to the evidence presented regarding the quantum involved in under-ordering of inmate meals, we find the evidence adduced regarding staff meals claim quantum to be substantive and reliable focusing as it does on an entire five- (5) year period rather than interpolating off a single month.

[6] Dividing $325,200, the total revenue lost per year by $1.20, the average price per meal, reflects that Appellant served approximately 270,833 staff meals per year. This is consistent with the testimony by Brian Mathiews that between 250,000 and 300,000 staff meals were served each year. March 4, 2003 Tr. 55.

Under Md. Code, State Fin. & Proc., § 15-222, this Board has statutory authority to award pre-decision interest to a contractor on the amounts to which the contractor has established entitlement and quantum. The applicable interest rate is fixed at 10% by Md. Code, Courts & Jud. Proc., § 11-107(a). However, interest may not accrue before the procurement officer receives a contract claim from the contractor. The authority to award pre-decision interest is discretionary. The Board awards pre-decision interest with a view toward making the contractor whole. However, the Board also considers the complexity of the claim and the legitimacy of the dispute over entitlement and attempts to determine when the State was in an adequate position to know the details of the claim and the extent of the equitable adjustment being requested. *See* Cam Construction Company of Maryland, Inc., MSBCA 1926, 5 MSBCA ¶394 (1996).

In Dep't of General Serv. v. Harmans, 93 Md. App. 535 (1993), discussed above, the Court of Special Appeals also considered the recoverability of interest.

In Harmans, the Court of Special Appeals ultimately upheld the Board's disallowance of interest, but the factors upon which that disallowance was premised are not present in this case. The Harmans court found that there was a legitimate dispute over the contractor's entitlement to equitable adjustments and that the uncertainty over entitlement was caused by the manner in which the parties had structured the transaction. The court further found that the State's position was "not ... arbitrary." *Id.*[7]

In the present case, Appellant's positions with regard to its entitlement for both the staff meals claim and the construction claims have been consistent and are based on sound principles of contract interpretation. The State's positions, by contrast, have been compromised by (1) its silence in the face of Respondent's awareness during negotiations that the Appellant believed that it would be compensated for staff meals without placing the cost in the inmate meal pricing; and (2) its insistence that Respondent was not responsible for any increased costs resulting from the differing site conditions at Building G.

Accordingly, the Board awards Appellant 10% per annum interest on the staff meals claim and on the differing site conditions construction claim and consequent higher price per meal renovation pricing period claim in accordance with §§ 11-107 and 15-222 of the State Finance and Procurement Article of the Annotated Code of Maryland.

In this appeal, it is appropriate with respect to the differing site conditions and renovation period claims to commence the interest calculation on July 16, 2000, thirty days after June 16, 2000, the date Appellant submitted such claims, because the claims were not that complex and entitlement could have been determined shortly after the filing of the notice of claim. In this regard, we also note that quantum has never seriously been challenged. By contrast, the staff meals claim as filed on June 16, 2000 was not finally perfected until the Contract was substantially completed and all staff meals for the entire five-year contract period could be quantified in February, 2003. This is a time frame that is essentially the same as the hearing on the appeal, and the Board in its discretion awards predecision interest on the staff meals claim commencing on April 10, 2003, thirty days from the

[7] *See also* Md. Port Adm. v. C.J. Langenfelder & Sons, 438 A.2d 1374 (1982) (holding that interest, or the "cost of money," is an appropriate element in calculating the equitable adjustment due a state contractor). I.W. Berman Prop. V. Porter Bros., 276 Md. 1 (1975).

date of the close of the hearing on March 11, 2003.

Wherefore it is Ordered this 4th day of February, 2004 that (1) Appellant is awarded an equitable adjustment in the amount of $518,865 for its differing site conditions construction claim and renovation pricing period claim with predecision interest at the rate of 10% from July 16, 2000; and (2) Appellant is awarded an equitable adjustment of $1,626,000 for the staff meals claim with pre-decision interest at the rate of 10% from April 10, 2003. Post-decision interest shall run from the date of this decision.

Dated: February 4, 2004

Robert B. Harrison III
Chairman

I Concur:

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2216, appeal of The Wackenhut Corporation under Department of Public Safety and Correctional Services Contract No. Q0097021.

Dated: February 4, 2004

Michael L. Carnahan
Deputy Recorder